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DARINSOK PANGIRAN APAN & ORS

v.

HAP SENG CONSOLIDATED BHD & ORS

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL WAHAB PATAIL JCA
DAVID WONG DAK WAH J
[CIVIL APPEAL NO: S-01-123-2008]

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9 JUNE 2011

LAND LAW: *Customary land - Native customary rights, claim for - Procedure on prosecuting claim - Whether must first file claim before Collector of Land Revenue - Whether must first appeal to Director of*

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Lands and Surveys - Appeal to High Court - Whether could only be proceeded with after Director had given decision - Land Ordinance (Cap 68) (Sabah), ss. 9, 12, 13, 14, 15, 16, 41 & 69

JURISDICTION: *High Court - High Court in Sabah - Customary land - Claim for native customary rights - Whether having original*

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jurisdiction to hear claims for native customary rights - Whether exercising only appellate jurisdiction - Land Ordinance (Cap 68) (Sabah), ss. 14, 41

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The State Government of Sabah in this case had alienated a piece of land to the first defendant, Hap Seng Consolidated Bhd. The plaintiffs alleged that the alienated land had trespassed onto their native customary land, and in the circumstances, applied to the Assistant Collector of Land Revenue ('ACLR') for a public inquiry to determine their native customary rights ('NCR') over the land

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vis-a-vis the provisions of the Sabah Land Ordinance (Cap 68) ('the Ordinance'). Having so applied to the ACLR, and pending a decision there from, the plaintiffs, however, proceeded to the High Court and applied for several declaratory relief relating to their said NCR claim. At the hearing, the defendants argued, by way of

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preliminary objection, that the recourse to the High Court was procedurally flawed as the High Court had no original jurisdiction in law to hear and entertain the plaintiffs' claim. The learned Judicial Commissioner agreed with the defendants and consequently allowed the preliminary objection and dismissed the

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plaintiffs' action. The plaintiffs appealed and the following primary

issues arose before the Court of Appeal for determination, namely: (i) whether the High Court had original jurisdiction to hear the plaintiffs' NCR claim; and consequently (ii) whether the plaintiffs must first await the ACLR's decision, and subsequently the Director of Lands and Surveys' decision on appeal, before they could proceed to appeal to the High Court.

Held (dismissing appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The procedure regulating applications for land in Sabah and NCR claims are contained in ss. 9, 12, 13, 14, 15, 41(1), 41(2), 69 and 84 of the Ordinance. Going by the provisions, it is clear that the High Court does not have any original jurisdiction to hear the plaintiffs' NCR claim. (paras 13-14 & 17)

(2) Specifically, under s. 14 of the Ordinance, the plaintiff's NCR claim has to be decided in the first instance by the ACLR. Thereafter, the plaintiffs may invoke s. 41(1) and appeal to the Director of Lands and Surveys, and it was only then, if they were still dissatisfied with the Director's decision, that they may resort to an appeal to the High Court under the second limb of s. 41(1). The plaintiffs thus may only proceed by way of appeal to the High Court via the court's appellate jurisdiction and not otherwise. This aside, it is also essential to state that where there is an alternative remedy available to the plaintiffs such as the ACLR in the instant appeal, the court will not interfere until and unless the alternative remedy is exhausted. (paras 14 & 16)

(3) Since the preliminary objection was based on the ground of duplicity of action and there is a pending claim before the ACLR, this court would therefore make the following consequential orders: (i) that the ACLR conduct a public inquiry, within 60 days hereof, relating to the plaintiffs' NCR claim under the Ordinance; and (ii) that the counterclaim by the second and third defendants (seeking a declaration that the plaintiffs have no NCR) be struck out, as that matter has now been placed before the ACLR. (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Kerajaan Negeri Sabah dalam kes ini telah memberikan sebidang tanah kepada defendan pertama, Hap Seng Consolidated Bhd. Plaintif-plaintif mendakwa bahawa tanah tersebut telah menceroboh tanah adat mereka, dan berikutnya telah memohon kepada Penolong Pemungut Hasil Tanah ('PPHT') untuk suatu inkuiri bagi memutuskan tuntutan hak tanah adat mereka ('NCR') terhadap tanah tersebut di bawah peruntukan Ordinan Tanah Sabah (Cap 68) ('Ordinan'). Walaupun begitu, tanpa menunggu apa-apa keputusan dari PPHT, plaintif-plaintif kemudiannya pergi ke Mahkamah Tinggi dan memohon beberapa relif berkaitan dengan tuntutan NCR mereka itu. Di pendengaran, defendan-defendan berhujah, melalui bantahan awal, bahawa memulakan tindakan di Mahkamah Tinggi adalah cacat secara prosedurnya, oleh kerana Mahkamah Tinggi tiada bidangkuasa asal di sisi undang-undang untuk mendengar tuntutan NCR plaintif-plaintif. Yang arif Pesuruhjaya Kehakiman bersetuju dengan hujah defendan-defendan dan sekaligus membenarkan bantahan awal. Perayu-perayu merayu dan persoalan-persoalan penting berikut berbangkit di hadapan Mahkamah Rayuan untuk pemutusan, iaitu: (i) sama ada Mahkamah Tinggi mempunyai bidangkuasa asal untuk mendengar tuntutan NCR plaintif-plaintif; dan oleh itu (ii) sama ada plaintif-plaintif harus terlebih dahulu menunggu keputusan PPHT, serta keputusan Pengarah Tanah dan Ukur atas rayuan, sebelum boleh membuat rayuan seterusnya ke Mahkamah Tinggi.

Diputuskan (menolak rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Prosedur yang mengawalselia permohonan untuk tanah dan tuntutan NCR di Sabah terkandung di dalam ss. 9, 12, 13, 14, 15, 41(1), 41(2), 69 dan 84 Ordinan. Menyelusuri peruntukan-peruntukan ini, jelas bahawa Mahkamah Tinggi tiada bidangkuasa asal untuk mendengar tuntutan NCR plaintif-plaintif.

(2) Khususnya, di bawah s. 14 Ordinan, tuntutan NCR plaintif-plaintif perlu diputuskan pada awalnya oleh PPHT. Berikutnya, plaintif-plaintif boleh membangkitkan s. 41(1) dan merayu kepada Pengarah Tanah dan Ukur, dan ianya hanya selepas

itu, iaitu jika mereka masih tidak berpuashati dengan keputusan Pengarah, bahawa mereka boleh merayu ke Mahkamah Tinggi di bawah jejari kedua s. 41(1). Ianya mengikut bahawa plaintif-plaintif hanya boleh membuat rayuan ke Mahkamah Tinggi melalui bidangkuasa rayuan mahkamah tersebut dan tidak sebaliknya. Selain itu, adalah penting untuk dinyatakan bahawa bilamana terdapat mana-mana remedi alternatif yang terbuka kepada plaintif-plaintif seperti yang diberikan oleh PPHT dalam rayuan semasa, maka mahkamah tidak akan campur tangan selagi dan melainkan remedi alternatif tersebut telah dimanfaatkan sepenuhnya.

(3) Oleh kerana bantahan awal didasarkan atas alasan pertindihan tindakan dan terdapat tuntutan yang menunggu keputusan di hadapan PPHT, mahkamah ini dengan itu membuat perintah-perintah turutan berikut: (i) bahawa PPHT mengadakan satu inkuiri awam, dalam tempoh 60 hari dari sekarang, berhubung dengan tuntutan NCR plaintif-plaintif di bawah Ordinan; dan (ii) bahawa tuntutan balas oleh defendan kedua dan ketiga (memohon deklarasi bahawa plaintif-plaintif tidak mempunyai NCR) dibatalkan, memandangkan perkara tersebut telah pun berada di hadapan PPHT.

Case(s) referred to:

Burhan Ating & Ors v. Directors of Lands & Surveys & Ors [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211 HC ***(refd)***

Ismail Yunus & Ors (For Themselves and On Behalf of 300 Ors) v. Syarikat Kerjasama Perkembangan Tanah Pegagau Berhad & Anor [1994] 4 CLJ 701 HC ***(refd)***

Manggai v. Government of Sarawak & Anor [1970] 1 LNS 80 FC ***(refd)***

Narinder Kaur v. Deyoh Opong & Ors [1997] 2 CLJ 895 HC ***(refd)***

State Government of Sabah v. Francis Lim & 5 Ors [1993] 1 LNS 66 HC ***(refd)***

Legislation referred to:

Land Ordinance (Cap 68) (Sabah), ss. 9, 12, 13, 14, 15, 16, 41(1), (2), 69, 82, 84

Native Court Ordinance (Cap 53) (Sarawak) 1958, s. 8(1)(c), (d), (2)

For the appellant - Mary Lee Chung Ching; M/s Lee & Kong

For the 1st respondent - Datuk Simon Shim (Bernard Chia with him); M/s Shim Pang & Co

For the 2nd & 3rd respondents - Michael Denis Tan; M/s Michael Denis Tan & Co

For the 4th & 5th respondents - Julita Gumpil; State Attorney General's Chambers

[Appeal from High Court, Kota Kinabalu; Suit No: K22-245-2002]

[Editor's note: For the High Court judgment, please see Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors [2008] 10 CLJ 150.]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] This appeal revolves around a novel question of law relating to the construction of the relevant provisions *viz* ss. 13, 14, 15, 16, 41 and 69 of the (Sabah) Land Ordinance (Cap. 68) ("the Ordinance"). (A reference hereinafter to a section is a reference to that section in the Ordinance). So far as we are aware, this Court did not have the opportunity to consider this question previously, although our High Court had done so.

[2] This appeal was brought by all the five appellants ("the plaintiffs") against the decision of the learned judicial commissioner who had sustained the preliminary objection raised for defendants 1, 2 and 3 ("the preliminary objection") and dismissed the plaintiffs' action with costs, on the ground that the High Court has no original jurisdiction to hear the plaintiffs' claim relating to native customary rights ("NCR") under the Ordinance.

Factual Background

[3] In February 1997, defendant 1 (Hap Seng Consolidated Bhd) applied for a piece of land measuring 25,000 acres in the district of Kinabatangan ("the Land"). A notice was published in accordance with s. 13.

[4] A letter of offer to alienate the Land was issued to Hap Seng Consolidated Bhd. After payment of the stipulated premium, the final Title Deed conferring absolute ownership was issued to Hap Seng Consolidated Bhd on 4 May 1998 over a smaller area ie, 21,819 acres of the Land.

[5] Four years later, the plaintiffs applied by letter dated 13 January 2002 to the Assistant Collector of Land Revenue, Kinabatangan ("the ACLR") asking for a public inquiry to determine their NCR under ss. 13, 14 and 15.

[6] On 3 May 2002, defendant 4 (the Director of Lands & Surveys) granted permission to transfer ownership of the Land to defendant 3 (Tanjung Bahagia Sdn Bhd).

[7] Pending the ACLR's determination of the plaintiffs' NCR claim, the plaintiffs commenced proceedings in the Kota Kinabalu High Court for various reliefs relating to their NCR claim.

[8] The learned judicial commissioner sustained the preliminary objection and dismissed the plaintiffs' action with costs.

[9] Hence, the plaintiffs' instant appeal.

Appellate Or Original Jurisdiction?

[10] Plaintiffs' learned counsel Ms Mary Lee Chung Ching contended that:

(1) the learned judicial commissioner had erred both in law and in fact in sustaining the preliminary objection and dismissing the plaintiffs' action; and

(2) the High Court has original jurisdiction to hear the plaintiffs' NCR claim.

[11] Learned counsel Datuk Simon Shim (Mr Bernard Chia with him) submitted for Hap Seng Consolidated Bhd that under the Ordinance, the plaintiffs' NCR claim did not come within the original jurisdiction of the High Court, because such jurisdiction was conferred, in the first instance, on the ACLR. Mr Michael Denis Tan, learned counsel for defendant 2 (Asiatic Development Bhd) and defendant 3 (Tanjung Bahagia Sdn Bhd), and learned state counsel Ms Julita Gumpil for defendant 4 (Director of Lands and Surveys) and defendant 5 (Sabah State Government) supported this submission.

[12] In our view, the question for determination in the instant appeal may be stated as follows:

A Upon a true construction of ss. 13, 14, 15, 16, 41 and 69, does the High Court have any original jurisdiction to hear and determine the plaintiffs' NCR claim?

[13] We would first outline below the procedure contained in the B Ordinance regulating applications for land in Sabah and NCR claims, as follows:

(1) Section 9 gives the Director of Lands and Surveys ("the Director") the power to alienate state land, subject to any general or special direction of the Minister.

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(2) Section 12 provides that an application for state land is to be made to the Director or the Collector and shall be substantially in the form of Schedule III.

D (3) Section 13 provides for the publication of a notice to ascertain NCR. Upon receiving any application for unalienated country land, it shall be the duty of the collector to publish a notice calling upon any NCR claimant who is not yet in possession of a registered documentary title to make or send in a E statement of his claim within a date to be specified in the notice. If no claim is made, the land shall be dealt with as if no such rights existed.

(4) Section 14 requires that claims to NCR shall be taken down in writing by eg, the ACLR who shall decide thereon.

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(5) Section 15 sets out the circumstances that NCR shall be held. Upon the NCR having been established, s. 16 provides for the NCR to be dealt with either by way of monetary compensation or a grant of the land to the claimant, in which G case a title shall be issued under Part IV.

(6) Under s. 41(1), an appeal shall lie from any order or decision of the ACLR to the Director, and again from any order or decision of the Director, whether original or on appeal, to the H High Court. The proviso to s. 41(1) sets out the circumstances which preclude an appeal, but those circumstances are irrelevant to the instant appeal.

(7) Section 41(2) provides for the ACLR's original jurisdiction to hear and determine NCR claims, so that no court shall I exercise any jurisdiction as to any claim or question in respect of which the original jurisdiction is given to the ACLR.

(8) Section 69 requires all claims to land based upon customary tenure to be decided by the ACLR acting under s. 82, subject to the appeal created in ss. 41 and 84. A

(9) Section 84 provides that all land which has not been claimed or the claim which had been rejected shall become absolutely the property of the State Government. B

[14] It is abundantly clear to us that the High Court does not have any original jurisdiction to hear the plaintiffs' NCR claim. Specifically, under s. 14, the plaintiffs' NCR claim has to be decided in the first instance by the ACLR. Thereafter, if the plaintiffs are dissatisfied with the ACLR's decision, the plaintiffs may invoke the first limb of s. 41(1) to appeal to the Director. The plaintiffs may thereafter bring their appeal (relating to their NCR claim) to the High Court under the second limb of s. 41(1). The plaintiffs do not have the right to commence their NCR claim in the High Court in order to urge the High Court to exercise its original jurisdiction. In other words, they may only proceed by way of appeal to the High Court and seek the court's assistance *via* appellate jurisdiction. The plaintiffs should have waited for the ACLR's decision on their pending application before the ACLR. If they are dissatisfied with the ACLR's decision, they may appeal to the Director and if they are still dissatisfied with the Director's decision, they may further appeal to the High Court. C D E

[15] In our view, Ian Chin Hon Chong J (as he then was) has in four judgments correctly dealt with same issue, ventilated in the High Court. These judgments merit our discussion as follows: F

(1) *Burhan Ating & Ors v. Directors of Lands & Surveys & Ors* [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211 HC. The plaintiffs' originating summons (which urged the High Court to exercise original jurisdiction) was struck out by the High Court as the Court has no original jurisdiction to hear the plaintiffs' NCR claim. The original jurisdiction has been placed under another tribunal ie, the ACLR. All claims to NCR are to be decided by the ACLR. Even if the claim to NCR is established, the ACLR shall deal with it under s. 16, either by way of monetary compensation or the issuance of a title to the claimant. Any claimant who is dissatisfied with the decision or order of the ACLR may appeal to the Director and G H I

A thereafter to the High Court under s. 41. The High Court is not to exercise original jurisdiction as to any claim or question in respect of which jurisdiction is given to the ACLR: See s. 41(2).

B (2) *Ismail Yunus & Ors (For Themselves and On Behalf of 300 Ors) v. Syarikat Kerjasama Perkembangan Tanah Pegagau Berhad & Anor* [1994] 4 CLJ 701 HC. *Burhan, supra* was applied. The principle that the Ordinance prohibits the court from exercising original jurisdiction over NCR claims was restated.

C (3) *Narinder Kaur v. Deyoh Opong & Ors* [1997] 2 CLJ 895 HC. The claim to NCR can only be maintained against state land and not alienated land.

(4) *State Government of Sabah v. Francis Lim & 5 Ors* [1993] 1
D LNS 66. Claims for NCR must be decided by the ACLR in the first instance.

[16] At this juncture, it is necessary for us to state that where there is an alternative remedy available to the plaintiffs in the form
E of another tribunal (such as the ACLR in the instant appeal), the court will not interfere until the alternative remedy is exhausted. The judgment of the Federal Court in *Manggai v. Government of Sarawak & Anor* [1970] 1 LNS 80 FC is remarkably relevant. There, a dispute over some land was determined by the district
F native court in Simanggang in the second Division of Sarawak. Pursuant to s. 8(1)(c) of the Native Courts Ordinance (Cap 43 of the Laws of Sarawak 1958), there was an appeal from the district native court to a Resident's native court. The appeal was allowed, and the decision of the district native court was quashed.
G *Vide* an action in the High Court at Kuching, the applicant sought a declaration that the decision of the Resident's native court was null and void. However, s. 8(1)(d) thereof provides for an appeal, by way of case stated on a point of law or native custom, from the decision of a Resident's native court to the Native Court of
H Appeal as constituted under s. 8(2) thereof. Notwithstanding that, the applicant did not pursue his right of appeal to the Native Court of Appeal. In the circumstances, the High Court refused the application for declaration. On appeal, the Federal Court affirmed the High Court decision. The Federal Court explained
I that the applicant ought to have pursued the alternative remedy available to him of an appeal to the Native Court of Appeal. In this regard, I am grateful to my learned brother David Wong Dak Wah J for his research and input herein.

Conclusion

[17] The plaintiffs' NCR claim must be decided in the first instance by the ACLR. The High Court does not have any original jurisdiction to hear the plaintiffs' NCR claim. We answer the above question in the negative, dismiss the plaintiffs' appeal and affirm the High Court decision.

[18] Since the preliminary objection was based on the ground of duplicity of action and there is a pending claim before the ACLR, we make the following consequential orders:

(1) that the ACLR conduct a public inquiry, within 60 days from the date hereof, relating to the plaintiffs' NCR claim under the Ordinance;

(2) that the counterclaim by defendants 2 and 3 *viz* Asiatic Development Bhd and Tanjung Bahagia Sdn Bhd respectively (seeking a declaration that the plaintiffs have no NCR) be struck out, as that matter has now been placed before the ACLR; and

(3) that on the facts of the instant appeal, there shall no order as to costs here.

[19] The deposit shall be refunded to the appellants.